

In the Matter of the Appeal of:

Diana's Recycling (Reg. #19432)
Souad Markous Yakoub
13886 Campo Road
Jamul, CA 91935

Appellant

DECISION AND ORDER ON APPEAL

Appellant listed the grounds for appeal as follows:

1. "...the Agency has not proven that the scale used by the Agency to weigh the items recycled was accurate, calibrated, and working properly since the Certificate of Accuracy Submitted by the Agency is from 2011..."
2. "...Appellant neither knew nor did she have reason to know that the scale reflected an inaccurate weight..."
3. "...The cause of the underweight is an independent intervening cause that terminates criminal liability..."
4. "...Appellant reasonably relied on a scale that had been tested and approved by the Agency and the Agency Acknowledges was working properly..."
5. "...the civil penalty should be reversed because the spirit of the law was not designed to punish Appellant for the innocent, non-wrongful, conduct involved..."
6. "...the civil penalty of \$400 per violation should be reduced because the evidence does not support finding that the offense is a Category A offense..."
7. "...penalty should be reduced because Appellant's action was a single course of conduct..."

II STATEMENT OF FACTS

San Diego County Agricultural/Standards Inspector Austin Shepard (Inspector Shepard) testified that on August 25, 2014, he went to 13886 Campo Road, Jamul, California, to follow up on allegations of wrongful acts by the business, Diana's Recycling. Inspector Shepard stated he received a consumer complaint emailed to the office that claimed the Appellant was not properly weighing products and shorting sellers. The county procedure is to do undercover transaction verification in these circumstances.

Inspector Shepard described his procedure of preparing recyclables for the undercover test sale. Inspector Shepard testified that he verified the accuracy of the County's scale using certified mass standards prior to weighing the materials to be sold and found the device to be correct. He stated that the procedure for preparing sample materials included allowing bottles and cans to air dry for four weeks in the winter or two weeks in the summer. Taking the dry sample material, Inspector Shepard prepared two samples: one group of aluminum cans weighing 5.50 pounds and one group of plastic bottles weighing 4.50 pounds. The product was weighed at the County office prior to bringing it to the business to be sold. After the sale, the transaction is documented prior to beginning any new tasks. Inspector Shepard testified that during his investigation on August 25, 2014, he observed the improper weighing of two amounts of recyclables and that both transactions had the same weight error demonstrating a shortage of 0.35 pounds. Inspector Shepard documented his findings on a Notice of Violation form on August 25, 2014 and later mailed it to the Appellant.

Respondent also provided evidence that the Appellant's scale may have been improperly balanced, which would explain why the weight was not accurate. Respondent presented testimony that there is no procedure or requirement to

investigate the cause of the inaccurate weights when conducting undercover test sales inspections.

Appellant presented as evidence the following: 1. A document showing that her scale had been tested by Jamie Olguin of San Diego Scale Company and that he found it to be accurate on September 5, 2014 (11 days after the undercover sale); 2. A document showing that her scale had been tested by Agricultural/Standards Inspector John Kinkaid and found to meet the required specifications and tolerances on December 3, 2014 (about four months after the undercover inspection); and 3. A photograph of one of the business's containers showing a zero condition on the scale to show they take a tare prior to any transaction.

Appellant testified that the business takes care to have product weighed accurately, that she proactively contacted a scale company to check the scale after receiving the Notice of Violation, and that she could not understand how this could happen if she had done things properly. Appellant contends that the evidence she provided proves the scale is accurate.

III STANDARD OF REVIEW

The Department addresses Appellant's contentions by adopting the standard utilized by the courts when reviewing administrative decisions on mandamus. It may not consider evidence outside the record, but must consider the entire record, and deny the appeal if there is any substantial evidence to support the findings. (*Smith v. County of Los Angeles* (1989) 211 Cal. App. 3d 188, 198-199) Substantial evidence is defined as evidence of "ponderable legal significance" which is "reasonable in nature, credible and of solid value," distinguishable from the lesser requirement of "any evidence." (*Newman v. State Personnel Board* (1992) 10 Cal. App. 4th 41, 47; *Bowers v. Bernards* (1984) 150 Cal. App. 3d 870, 873). In other words, the Department cannot substitute its judgment for the judgment of the finder of fact if there is enough relevant and reliable information to establish a fair argument in support of the result, even if other results might have also been reached. (*Smith v. County of Los Angeles, supra*; *Bowers v. Bernards, supra*, 10 Cal. App. 4th at 873-874)

IV DETERMINATION OF ISSUES

Preliminarily, the Department finds that sufficient evidence of the violations was presented during the course of the hearing. The verbal and written testimony provided by the Respondent sufficiently established that good measurement practices were followed in determining the weight of the product prior to sale and that it was kept under his control until the time of the sale. Furthermore, Respondent established through the use of certified weights that their scale was accurate prior to determining the weight of the product. The photographs showing the weight of the materials prior to sale, coupled with the receipt from the business showing the weights documented from the business's

scale at the time of sale, demonstrate that Mr. Shepard was not compensated for the true weight of materials sold. In both circumstances, the scale was off by 0.35 pound.

BPC Section 12512 is a strict liability statute and there is no need to prove intent. It is immaterial that Appellant did not know or have the ability to know that the scale was not reflecting an accurate weight.

As for the matter of the fine level, Table A found in the California Code of Regulations, Title 4, Division 9, Chapter 12, Article 2. Weights and Measures Penalty Guidelines, dictates that a violation of BPC Section 12512 is a Type 1 violation or Category A. Category A violations have fine levels that range from four hundred dollars (\$400) to one thousand dollars (\$1,000). The fine level was set at the lowest amount allowed under the regulations and cannot be reduced further.

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**BEFORE THE
DEPARTMENT OF FOOD AND AGRICULTURE
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of:)

Diana's Recycling (Reg. #19432))

Souad Markous Yakoub)

13886 Campo Road)

Jamul, CA 91935)

Appellant)

File No. 122-SEA-SD-14/15

**DECISION AND ORDER
ON APPEAL**

V

DECISION

For the foregoing reasons, the Hearing Officer's position is affirmed and the civil penalty of eight hundred dollars (\$800) is upheld in this matter. Appellant is required to pay the civil penalty in the amount of \$800 to the San Diego County Department of Weights and Measures.

This Decision and Order shall be effective July 29, 2015.

IT IS SO ORDERED this 29TH day of JUNE, 2015.



CRYSTAL D'SOUZA

Staff Counsel

Department of Food and Agriculture

APPELLANT'S RIGHT TO SEEK JUDICIAL REVIEW

Judicial review of the decision of the Department may be sought within thirty (30) days of the effective date of this decision pursuant to Section 1094.5 of the Code of Civil Procedure.